Rosslyn Concrete Construction Company *and* Washington Building and Construction Trades Council, AFL-CIO. Case 5-CA-13806

May 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on October 16, 1981, by Washington Building and Construction Trades Council, AFL-CIO, herein called the Union, and duly served on Rosslyn Concrete Construction Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on November 18, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 30, 1981, following a Board election in Case 5-RC-11115, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about August 19, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 23, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 28, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 3, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause and a Cross-Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motions for Summary Judgment

In its answer to the complaint herein, Respondent admits its refusal to bargain with the Union, but denies that such refusal was unlawful, arguing that the Board improperly certified the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate. In its response to the Notice To Show Cause, Respondent asserts that the Board erroneously resolved the voter eligibility issues in Case 5-RC-11115.

Our review of the record in Case 5-RC-11115 reveals that on February 11, 1980, the Union filed with Region 5 of the Board a petition seeking certification as the representative of certain employees of Respondent at its jobsites in the Washington, D.C., metropolitan area. Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director on March 4, 1980, the Regional Director conducted a secret-ballot election on April 1, 1980. At the conclusion of the election the parties were furnished with a tally of ballots which showed that 151 of approximately 156 eligible voters cast ballots, of which 66 valid ballots were cast for the Union and 68 valid ballots were cast against the Union. There were 17 challenged ballots and no void ballots. On April 18, 1980, Petitioner filed timely objections to conduct affecting the results of the election, requesting that the election be set aside. On July 24, 1980, following investigation of the Respondent's objections, the Regional Director issued a Report on Challenges and Objections in which he recommended that a hearing be conducted because Petitioner's objections raised substantial and material issues of fact. A hearing was also recommended to resolve issues raised by challenges to the ballots of several employees. Respondent and Petitioner filed with the Board exceptions to the Regional Director's "Report on Challenges and Objections, Order Consolidating Cases and Notice of Hearing." The Board thereafter, on November 21, 1980, adopted the Acting Regional Director's recommendation that the challenge to three ballots be overruled and that challenges to three other ballots be sustained and directed that issues raised by certain challenges as well as by certain of Petitioner's objections be consolidated for purposes of a hearing with the complaint in Case 5-CA-12133. On March 5, 1981, the Acting Regional Director issued an "Order De-

[1] Official notice is taken of the record in the representation proceeding, Case 5-RC-11115, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

consolidating Cases and Approval of Request for Withdrawal of Objections and Notice of Hearing on Challenges." On March 11, 1981, a hearing on the unresolved challenges was conducted before a Hearing Officer of the National Labor Relations Board who issued has report on April 29, 1981. All parties appearing were afforded a full opportunity to participate in the hearing, to introduce relevant evidence, and to examine and cross-examine witnesses. Respondent filed exceptions to the Hearing Officer's report on May 12, 1981. Petitioner filed an answering brief on May 18, 1981. On July 15, 1981, the Board issued a Decision, Order, and Direction adopting the Hearing Officer's decision and ordering that the ballots of seven employees be opened and counted. On July 24, 1981, the Region opened and counted the ballots as directed by the Board. A revised tally of ballots was served on the parties which showed that there were 73 valid votes cast for the Petitioner and 71 valid votes cast against the Petitioner with 7 sustained challenges and no void ballots. On July 30, 1981, the Board issued its Decision and Certification of Representative, certifying the Union as the collective-bargaining agent of a unit consisting of all Respondent's employees performing construction work in the Washington Metropolitan area; but excluding all office clericals, professionals, guards and supervisors as defined in the Act.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and we deny Respondent's Cross-Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, a Virginia corporation with its principal office located in Rosslyn, Virginia, has been engaged in, and is engaged in, the construction of concrete reinforced buildings at various jobsites in the Washington, D.C., metropolitan area. During the preceding 12 months, in the course and conduct of its business described above, Respondent purchased and received at its Rosslyn, Virginia, facility products, goods, and materials valued in excess of $50,000 from points located outside the Commonwealth of Virginia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Washington Building and Construction Trades Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent, performing construction work in the Washington, D.C. Metropolitan Area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On April 11, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 5, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 30, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 13, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 19, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 19, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Rosslyn Concrete Construction Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Washington Building and Construction Trades Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees employed by Respondent performing construction work in the Washington, D.C., metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since July 30, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about August 19, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Rosslyn Concrete Construction Company, Rosslyn, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Washington Building and Construction Trades Council, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees employed by Respondent, performing construction work in the Washington, D.C. Metropolitan Area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Rosslyn, Virginia, office and at all of its jobsites in the Washington, D.C., metropolitan area copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Washington Building and Construction Trades Council, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees employed by us, performing construction work in the Washington, D.C., metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

ROSSLYN CONCRETE CONSTRUCTION COMPANY